INDEX

	Page No.
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Adams v. *United States ex rel. McCann*, 317 U. S. 269	8, 9
Callahan v. *United States*, 240 Fed. 683	8
Crites v. *Radtke*, 29 F. Supp. 970	10
Dutton v. *State*, 123 Md. 373	9
Eury v. *Huff*, 141 F. 2d 554	10
Grove v. *United States*, 3 F. 2d 965, certiorari denied, 268 U. S. 691	8
Johnson v. *Zerbst*, 304 U. S. 458	8
Keddington v. *State*, 19 Ariz. 457	9, 11
Levin v. *United States*, 5 F. 2d 598, certiorari denied, 269 U. S. 562	8
Moore v. *State*, 151 Ga. 648	8, 9
Oliver, In re, 333 U. S. 257	7
Patton v. *United States*, 281 U. S. 276	8, 9
People v. *Stanley*, 33 Cal. App. 624	9
Putnam v. *Day*, 22 Wall. 60	10
Reagan v. *United States*, 202 Fed. 488	8
Robertson v. *United States*, 64 Fla. 437	8
Sawyer v. *Duffy*, 60 F. Supp. 852	8
Smith v. *United States*, 337 U. S. 137	9
State v. *Croak*, 167 La. 92	8
State v. *Johnson*, 26 Idaho 609	8
State v. *Keeler*, 52 Mont. 205	9
State v. *Nyhus*, 19 N. D. 326	8, 9
State v. *Smith*, 90 Utah 482	9, 11
Steiner v. *United States*, 134 F. 2d 931	7
Tanksley v. *United States*, 145 F. 2d 58	8
United States v. *Jones*, 162 F. 2d 72	8
United States v. *Kobli*, 172 F. 2d 919	3, 7
United States v. *Moe Liss*, 105 F. 2d 144	10
Worthington v. *United States*, 1 F. 2d 154, certiorari denied, 266 U. S. 626	8

Constitution:

Sixth Amendment	8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 311

VINCENT ANTHONY SORRENTINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 77-80) is reported at 175 F. 2d 721.

JURISDICTION

The judgment of the Court of Appeals was entered July 6, 1949 (R. 81). On July 20, 1949, by order of Mr. Justice Burton, petitioner's time for filing a petition for a writ of certiorari was extended to and including September 3, 1949 (R. 82), and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45 (a), F.R. Crim. P.

QUESTIONS PRESENTED

At the opening of the trial of petitioner and a co-defendant for conspiracy and substantive violations of the Mann Act, the court noted that the crowded condition of the court room left no room for the panel of prospective jurors, who were waiting in another room, and that many young girls of tender years were among the spectators. Because of these conditions and the nature of the case, and with the agreement of all three of petitioner's trial counsel, the court cleared the court room of all persons except the defendants, counsel, witnesses, representatives of the press, and such persons as defense counsel desired to have remain. This order was not enforced, however, after the selection of the jury had been completed. The questions are whether, in respect of these proceedings on the first day of the trial, petitioner's right to a public trial could be waived and whether it was waived.

STATEMENT

Petitioner and three co-defendants were indicted for conspiracy and substantive violations of the Mann Act (see R. 1). The defendants Riviello and Schiavo changed their pleas to guilty at the opening of the trial and petitioner and the defendant Kobli stood trial together and were convicted (see R. 1-3). The questions here concern

only the action of the trial court in clearing the court room of spectators on the first day of the trial. The facts as to this phase of the trial proceedings were developed after the Court of Appeals had, upon the basis only of the District Court's order at the opening of the trial clearing the court room (*infra,* p. 5), to which only Kobli's counsel objected (R. 2), and without knowledge as to what had transpired in this regard at the later stages of the trial, reversed Kobli's conviction on her separate appeal and remanded her case for a new trial on the ground that she had not been accorded a public trial as guaranteed by the Sixth Amendment. *United States* v. *Kobli,* 172 F. 2d 919.[1] Thereafter, the Court of Appeals allowed petitioner to enlarge the scope of his appeal to include the question whether he had also been "denied a public trial" (R. 4). The Government thereupon asked leave to supplement the record to show that in fact the trial court's order of exclusion was not enforced after the jury was selected (R. 5-7). This motion was granted and the trial judge was directed to file a certificate in the Court of Appeals "disclosing the physical state of the Courtroom during the trial and the actual happenings therein, so far as such physical

[1] After summarizing in its opinion the proceedings leading to the trial court's order of exclusion, the Court of Appeals said (172 F. 2d at 921): "While counsel at our bar were not in agreement with respect to what later transpired the record reveals nothing from which it might fairly be inferred that the order to clear the courtroom of the general public was later modified or rescinded."

state and happenings may bear upon the fact of whether or not the trial of this Appellant in the District Court was open to the public; and was attended by the public" (R. 8). Pursuant to this direction, the trial judge held a hearing at which persons who were present at the trial testified. A transcript of these proceedings (R. 13-76) and a certificate of the trial judge (R. 9-10) were filed as part of the record in the Court of Appeals. The facts thus developed may be summarized as follows:

When the case was called on November 5, 1947, the court room was "packed" with between 150 and 175 people (R. 16),[2] about one-half of whom were young boys and girls 14 to 18 years old (R. 17), so that there was no room for the panel of 54 jurors, who were waiting in another room (R. 18), since the court room had seating accommodations for only 96 spectators and standing room for approximately 50 more (R. 16, 25). The trial judge, noting that there was no more standing room and "no room at all for the jury," asked counsel for the four defendants if they had any objection to "clearing the Courtroom of all people except jurors, witnesses, lawyers and members of the press." Although two of Kobli's attorneys objected to this, each of petitioner's three attorneys, as well as the attorneys for Riviello and Schiavo, expressly stated that he had no objection

[2] Over 400 more people crowded the corridors seeking admission (R. 16).

(R. 2). The judge then ordered that the court room be partially cleared, as follows (R. 3):

> To the ladies and gentlemen who are in the Courtroom I might say to you there isn't even standing room in the Courtroom at the present time. The jurors are in the other Courtroom. They have taken a recess there and there must be room for the jury. Court notices a great many young girls of tender years in this room. One counsel has objected to the Courtroom being cleared and insists upon a public trial. This Court, in the absence of the jury, feels the nature of this case is such that the Courtroom should be cleared and directs that the Courtroom be cleared of all people except the defendants, their counsel, witnesses and members of the press. The Court officer is directed to clear the Courtroom of all persons notwithstanding one of counsel objects.

The court room was cleared in accordance with this direction (R. 41, 42) and the veniremen were brought in (R. 18). At the same time, four or five law students were admitted (R. 19, 25). About 16 witnesses remained in the court room (R. 31, 52, 70). Neither of petitioner's counsel asked that any other persons be admitted (R. 33). The remainder of the session on November 5 was devoted to pre-trial motions and the selection of a jury; no testimony was taken (R. 33).[3]

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[3] It appears that this session did not begin until the afternoon of November 5 (see Pet. 13).

At the ensuing sessions of the trial, on November 6, 7 and 8, 1947, the public was admitted. In his certificate, the trial judge described the situation on those days as follows (R. 9-10; see also R. 28, 35-36):

> From the time the taking of testimony commenced, while children of tender years were excluded, all adults who desired to attend the trial were permitted to do so subject to the limitations of the seating space available.
>
> The number of spectators present increased as the trial progressed, so much so that at the evening session of the first day of taking testimony, and thereafter to the end of the trial, not only all available seating space but, in addition, standing room was occupied by members of the body politic having no connection with the trial other than as spectators.
>
> From the time of the commencement of taking testimony until the end of the trial no adult who desired admission to the trial was excluded while seating space in the courtroom was available.

On this record, the Court of Appeals held that the constitutional guarantee of a public trial applies to the process of selecting a jury as part of a criminal trial, but that petitioner's right in respect of the first day's proceedings was validly waived (R. 78-80).

ARGUMENT

Much of petitioner's argument is devoted to generalities and is pitched upon the hypothesis

that the general public was excluded throughout the trial. But the record shows that the trial was opened to the public after the first day's session, when the jury was selected, and the Court of Appeals agreed, implicitly at least, that there was no infringement of the right to a public trial at the ensuing sessions (see R. 78).[4]

We agree with the Court of Appeals and petitioner (Pet. 11-13) that a trial, within the meaning of the guarantee of a "public trial," includes the selection of a jury.[5] And it may be assumed, *arguendo,* although we do not concede, that the Court of Appeals was right in holding that the enforcement of the trial judge's exclusionary order on the first day was improper if there was no valid waiver of the right to have the public admitted.[6] The questions, then, are whether that

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[4] On Kobli's appeal, the Court of Appeals held, and rightly so, that the trial judge's action in excluding youngsters was "laudable" (172 F. 2d at 924), and petitioner apparently makes no complaint on this score.

[5] It would seem, however, that it does not embrace argument of pre-trial motions. See *Steiner* v. *United States,* 134 F. 2d 931, 935 (C.A. 5).

[6] The Court of Appeals did not mention the fact that some law students were admitted before the jury was selected. In addition to counsel, there were present, at least (see R. 19-20), petitioner's wife (R. 56), representatives of the press, witnesses, and 54 veniremen drawn from those among the general public who were subject to jury duty. There is no claim that any person was excluded who might have contributed to the purpose of the trial to elicit the truth. Indeed, although the opportunity was afforded them, petitioner's counsel made no request that anybody not present be admitted. In these circumstances, we believe we may rightly ask how many of the public must be admitted and present to constitute a "public trial". See *In re Oliver,* 333 U.S. 257, 271-272: "And without exception all courts have held that an accused

right can be waived and, if so, whether it was waived. We think the Court of Appeals correctly answered both questions in the affirmative.

1. The right to a public trial is guaranteed by the Sixth Amendment, which provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *." Among the other rights protected by that Amendment, it has been held that the right to a jury trial,[7] the right to have the assistance of counsel,[8] the right to a speedy trial,[9] the right to be confronted with the witnesses against him,[10] and the right to trial in the state and district of the crime,[11] all may be waived by the defendant.[12] In *Patton* v. *United States,* 281

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is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." See also the following cases sustaining exclusions throughout the trials of all but counsel, friends and relatives, and representatives of the press: *Callahan* v. *United States,* 240 Fed. 683 (C.A. 9); *Reagan* v. *United States,* 202 Fed. 488, 490 (C.A. 9) (compare *Tanksley* v. *United States,* 145 F. 2d 58 (C.A. 9)); *Sawyer* v. *Duffy,* 60 F. Supp. 852, 853 (N. D. Cal.); *State* v. *Nyhus,* 19 N.D. 326, 330; *Moore* v. *State,* 151 Ga. 648, 653; *Robertson* v. *United States,* 64 Fla. 437, 440; *State* v. *Croak,* 167 La. 92, 96-97; *State* v. *Johnson,* 26 Idaho 609, 612.

[7] *Patton* v. *United States,* 281 U.S. 276, 308; *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 275.

[8] *Johnson* v. *Zerbst,* 304 U.S. 458; *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, 275.

[9] *Worthington* v. *United States,* 1 F. 2d 154 (C.A. 7), certiorari denied, 266 U.S. 626.

[10] *Grove* v. *United States,* 3 F. 2d 965, 966 (C.A. 4), certiorari denied, 268 U.S. 691.

[11] *United States* v. *Jones,* 162 F. 2d 72, 73 (C.A. 2).

[12] The rights under the Fifth Amendment against double jeopardy, *Levin* v. *United States,* 5 F. 2d 598, 600 (C.A. 9),

U. S. 276, 297-8, in holding that the right to trial by a jury was not a part of the structure of government, but a right or privilege of the accused which could be waived by him, this Court found support for its conclusion in the introductory words of the Sixth Amendment, "the accused shall enjoy." In view of this structure of the Amendment, it is difficult to see how some of the rights which it confers may not be waived while others may be waived. It is true, of course, as some of the cases cited by petitioner point out (Pet. 16-17), that the people have an interest in knowing what is being done in their courts. Nevertheless, it seems clear that the right to a public trial, like other equally important procedural safeguards of the Bill of Rights, is primarily for the benefit of the accused,[13] and it has often been held that this right may be waived.[14] Petitioner cites no decision to the contrary.

2. Petitioner asserts, however, that the action of his trial counsel in expressly waiving objection to the court's order of exclusion was ineffective because he did not himself consent to it (Pet.

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certiorari denied, 269 U.S. 562, and self-incrimination, *Smith* v. *United States*, 337 U.S. 137, 150, and cases cited, may also be waived.

[13] *State* v. *Nyhus*, 19 N.D. 326, 330; *State* v. *Smith*, 90 Utah 482, 491; *Moore* v. *State*, 151 Ga. 648, 654; *State* v. *Keeler*, 52 Mont. 205, 218. Cf. *Adams* v. *U. S. ex rel. McCann*, 317 U.S. at 279-280; *Patton* v. *United States*, 281 U.S. at 302-308.

[14] *Keddington* v. *State*, 19 Ariz. 457, 462; *People* v. *Stanley*, 33 Cal. App. 624, 628; *State* v. *Smith*, 90 Utah 482, 491-492; *Dutton* v. *State*, 123 Md. 373, 388.

22-29). This argument is afterthought. As the Court of Appeals pointed out (R. 80), petitioner was represented by three experienced attorneys of his own choice, and it would seem that their decision on the question of procedure raised by the trial judge's proposal to clear the court room in order to make room for the panel of jurors (R. 2) was binding upon him.[15] See *Putnam* v. *Day*, 22 Wall. 60, 64; *Eury* v. *Huff*, 141 F. 2d 554, 555 (C.A. 4).[16] Moreover, petitioner must have been aware of what was taking place, yet he made no objection. In these circumstances, and in view of the nature of the charges against him and his co-defendants, we think the court below was right in holding that it must be concluded that he acquiesced in his attorneys' judgment and that he is therefore in no position to complain now that they had no authority to speak for him. See *United States* v. *Moe Liss*, 105 F. 2d 144, 145 (C.A. 2); *Crites* v. *Radtke*, 29 F. Supp. 970, 971-

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[15] There is no justification for petitioner's implication (Pet. 28, 30) that his trial attorneys consented to the court's proposal because they felt it would have been "vain" to object. The question of clearing the court room was put to all counsel at a conference at the bench and each of them was given an opportunity to object before the order was made. Counsel for Kobli noted an objection before the question was put to petitioner's counsel. (R. 2-3.)

[16] Petitioner's attempt to distinguish the *Eury* case on the ground that the defendant there himself agreed to proceed with a jury of ten misses the point. The very basis of the defendant's later attack by habeas corpus upon the validity of his conviction was that he was not aware at the time of his trial of his right to a jury of twelve.

972 (S.D.N.Y.); *Keddington* v. *State,* 19 Ariz. 457, 462; *State* v. *Smith,* 90 Utah 482, 491-492.[17]

CONCLUSION

The judgment below is correct, there is no conflict, and the arguments advanced by petitioner present nothing meriting further review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1949.

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[17] In answer to petitioner's plea that it is unfair to allow his conviction to stand after Kobli was awarded a new trial (Pet. 29-30), we think it is proper to point out, *dehors* the record, that following the reversal of Kobli's conviction the Government was prepared to file a petition for rehearing and a motion to supplement the record similar to the motion later filed and allowed in petitioner's case (see p. 3, *supra*) when Kobli appeared before the District Court with her counsel and, with leave of court, changed her plea to guilty and was sentenced. In view of this development, it is idle to speculate whether, upon the record as so supplemented, Kobli's conviction would have been reversed or whether she and petitioner received equal justice in the Court of Appeals.

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